

CIVIL PROCEDURE: *Setting aside – Consent judgment – Application to set aside consent judgment – Whether there were grounds warranting setting aside of consent judgment – Whether there was irregularity in consent judgment – Whether consent judgment vitiated by fraud, misrepresentation and total failure of consideration – Whether consent judgment tainted with illegality – Whether consent judgment ought to be set aside*

D The first plaintiff, a company which ran the business of designing,
constructing and supplying vessels and crafts, had obtained various credit
facilities from the second plaintiff in the amount of RM884,330,000. As
security for the credit facilities, the first plaintiff created charges over all its
assets in favour of the second plaintiff under two debentures
(‘the debentures’). The first plaintiff then entered into shipbuilding contracts
E with the defendant for the sale of vessels. A consent judgment was entered
into between the first plaintiff and the defendant where it was recorded
that (i) the first plaintiff shall pay the defendant the sum of RM50,000,000
(‘the settlement sum’); (ii) should the first plaintiff fail, refuse and/or neglect
to pay the settlement sum, any outstanding sum shall become immediately
due and payable; and (iii) the first plaintiff was restrained from dealing with
F the vessels until the settlement sum had been paid in full. A winding up
petition was presented against the first plaintiff. The first plaintiff was wound
up and its assets, which were charged to the second plaintiff, were realised
by the receiver and manager (‘R&M’) and this included the vessels owned
by the first plaintiff. The R&M applied at the High Court to set aside the
G consent judgment but the application was dismissed on the ground that a fresh
action ought to be filed in order to set aside the consent judgment. Hence,
the present suit. The plaintiffs argued that the consent judgment should be set
aside (i) as it was irregular because it was, *inter alia*, vitiated by fraud,
misrepresentation and a total failure of consideration; (ii) as it was tainted
H with illegality because the agreements between the first plaintiff and the
defendants were null and void due to the lack of consent by the second
plaintiff under the debentures; and (iii) the restraining order in the consent
judgment was a perpetual injunction against the R&M.

Held (dismissing application with costs):

- I (1) The grounds to set aside a consent judgment would include fraud, mistake, total failure of consideration, misrepresentation, coercion, undue influence and other grounds in equity. The plaintiffs failed to establish the above. There was no evidence to show that the consent

judgment was obtained as result of a deliberate fraud perpetrated on the court or by reason of a deception on the court or by suppression of any material evidence by the defendant. The parties had agreed to the terms of the consent judgment and realised the implications of the same. (paras 24, 28, 29 & 32)

- (2) The plaintiffs tried to establish that the agreements between the first plaintiff and the defendants were null and void due to the lack of consent by the second plaintiff under the debentures. However, these were based on the construction of the documents and not a defiance of a substantive statutory prohibition which rendered it null and void on the grounds of illegality or lack of jurisdiction. There was also no evidence that the defendant was privy to the alleged fraud committed by the directors of the first plaintiff, namely to sell the vessels without the consent of the second plaintiff. (paras 37-38)

- (3) The restraining order was merely to restrain the first plaintiff from dealing with the vessels until the judgment sum was fully settled. It was not a perpetual injunction and was granted before the first plaintiff was wound up. (para 42)

Case(s) referred to:

Badiaddin Mohamad Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC (*dist*)

Goh Hock Hai v. EON Bank Bhd [2012] 4 CLJ 956 HC (*refd*)

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 (*dist*)

Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC (*refd*)

Tong Lee Hwa & Anor v. Chin Ah Kwi [1971] 1 LNS 143 FC (*refd*)

Legislation referred to:

Contracts Act 1950, s. 24

Specific Relief Act 1950, s. 51(2)

For the plaintiffs - KK Chan & Winnou Chung; M/s Shook Lin & Bok

For the defendant - K Selva Kumaran & G Shanker; M/s Rose Hussin

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi J:

Introduction

- [1] In this suit, the plaintiffs are seeking the following orders:

- (i) a declaration that the first plaintiff is the legal and beneficial owner of the three vessels bearing Hull Nos. 1116, 1182 and 1187 at all material times;

- A (ii) a declaration that the three vessels bearing Hull Nos. 1116, 1182 and 1187 were charged by the first plaintiff in favour of the second plaintiff at all material times and the second plaintiff's rights as chargee of the said three vessels take priority over any alleged claim of the defendant;
- B (iii) a declaration that the first plaintiff was the legal and beneficial owner of the two vessels bearing Hull Nos. 1115 and 1175 at all material times and that the said two vessels were charged to the second plaintiff until these vessels were delivered to one Sribima (M) Shipping Sdn Bhd and Crossborder Scrapes (M) Sdn Bhd respectively;
- C (iv) that the consent judgment dated 9 February 2011 entered in the Kuala Lumpur High Court Civil Suit No. S-22NCVC-62-2011 be set aside;
- (v) further and/or in the alternative that para. 3 of the consent judgment dated 9 February 2011 entered in the Kuala Lumpur High Court Civil Suit No. S-22NCVC-62-2011 be varied and/or set aside such that the receiver and manager of the first plaintiff, the second plaintiff and the vessels bearing Hull. Nos. 1116, 1115 and 1187 are not affected in any manner by the said consent judgment; and
- D (vi) costs.

- E [2] Having considered the evidence and the submissions of all parties, this court has dismissed the plaintiffs' claim with costs.

The Salient Facts

- F [3] The first plaintiff is a private limited company incorporated in Malaysia and was involved in the business of design, construction and supply of vessels and crafts.

[4] The second plaintiff is a licensed financial institution incorporated in Malaysia with its registered address at 14th Floor, Menara Maybank, 100 Jalan Tun Perak, 50050 Kuala Lumpur.

- G [5] The defendant is a company incorporated in the British Virgin Islands with an address for service at No. 33, Jalan Bola Jaring, Section 13, Shah Alam, Malaysia.

- H [6] The first plaintiff had obtained various credit facilities from the second plaintiff totalling RM884,330,000 to finance, *inter alia*, the construction of vessels.

- I [7] As security for the said credit facilities, the first plaintiff created, *inter alia*, charges over all its assets in favour of the second plaintiff under two debentures dated 24 January 2008 and 11 June 2010 and four debentures dated 26 June 2012 (the "debentures").

[8] The first plaintiff has entered into shipbuilding contracts dated 26 October 2009 with the defendant, whereby the first plaintiff has agreed to construct and deliver to the defendant, and the defendant had agreed to purchase, four units of vessels Hull No. 1116, 1121, 1122 and 1182 (the “vessels”). The salient terms of the shipbuilding contracts are as follows:

- (i) the purchase price for vessel Hull No. 1116, 1121, 1122 and 1182 were RM10,000,000 each (“purchase price”);
- (ii) upon the payment of the purchase price by the defendant, the first plaintiff holds and will hold the vessels on trust for the defendant;
- (iii) the first plaintiff undertook to complete the construction of the vessels and deliver the same to the defendant by 28 February 2010 with a grace period of 30 days; and
- (iv) the defendant has granted the first plaintiff an option to purchase all the vessels from the defendant within a period of six months from the date of the agreements for the sum of RM50,000,000.

[9] The defendant states that the purchase price for the vessels have been paid by the defendant. Consequently, trust deeds dated 26 October 2009 in respect of the vessels were executed between the first plaintiff and the defendant, wherein the first plaintiff declared, *inter alia*, that:

- (i) the purchase price for the vessels have been fully paid by the defendant;
- (ii) the first plaintiff was in possession and will be in possession of the vessels and all equipment, fixture and other property which have been affixed and may be installed or affixed to the vessels upon trust for the defendant.

[10] In respect of vessels Hull No. 1121 and 1122, the first plaintiff and the defendant has entered into a supplemental agreement dated 22 October 2010, which include the following terms:

- (i) the purchase price for the re-purchase of vessel Hull No. 1121 and 1122 by the first plaintiff is RM25,000,000;
- (ii) the defendant agreed to purchase from the first plaintiff three vessels Hull No. 1155, 1175 and 1187 at the purchase price of RM25,000,000.

[11] The terms of the agreement for the purchase of vessel Hull No. 1155, 1175 and 1187 (“batch 2 vessels”) includes:

- (i) the purchase price for vessel Hull No. 1115, 1175 and 1187 were RM25,000,000 each (“batch 2 purchase price”);
- (ii) upon the payment of the batch 2 purchase price by the defendant, the first plaintiff holds and will hold the batch 2 Vessels on trust for the defendant;

- A (iii) the first plaintiff undertook to complete construction of the batch 2 vessels and deliver the same to the defendant by 28 March 2010 with a grace period of 30 days; and
- (iv) the defendant has granted the first plaintiff an option to purchase the batch 2 vessels from the defendant any time before the batch 2 vessels, delivery date within a period of six months from the date of the agreements for the sum of RM25,000,000.
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[12] The trust deed for the batch 2 vessels, *inter alia*, provides that:

- (i) the purchase price for the batch 2 vessels has been fully paid by the defendant;
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- (ii) the first plaintiff was in possession and will be in possession of the batch 2 vessels and all equipment, fixture and other property which have been affixed and may be installed or affixed to the vessels upon trust for the defendant.

D [13] On 9 February 2011, a consent judgment (“consent judgment dated 9 February 2011”) was entered between the first plaintiff and the defendant in Kuala Lumpur High Court Civil Suit No. S-22NCVC-62-2011 on the following terms:

- E (i) that the first plaintiff shall pay the defendant the sum of RM50,000,000 as a settlement sum in the following manner:
- (a) the sum of RM9,000,000 on or before 20 February 2011;
- (b) the sum of RM10,000,000 on or before 20 March 2011;
- F (c) the sum of RM8,000,000 on or before 30 April 2011;
- (d) the sum of RM10,000,000 on or before 30 May 2011; and
- (e) the sum of RM13,000,000 on or before 30 June 2011.
- (ii) should the first plaintiff fail, refuse and/or neglect to pay the settlement sum according to para. (i) above, any outstanding sum shall become immediately due and payable; and
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- (iii) that the first plaintiff and/or their agents and nominees are restrained in any way from dealing with the five vessels bearing Hull Nos. 1116, 1115, 1175 and 1187 respectively in any way until the settlement sum has been paid in full by the first plaintiff to the defendant.
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[14] On 14 March 2013, a winding-up petition was presented by one Nordic International Ltd against the first plaintiff under Kuala Lumpur High Court – Companies (Winding-Up) Petition No. 28NCC-221-03-2013 (the “winding-up petition”) and was served on the first plaintiff on 18 March 2013.

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[15] By a letter dated 20 March 2013 issued by the second plaintiff's solicitors, and served on the first plaintiff on 20 March 2013, the floating charges created under the debentures over the assets and rights of the first plaintiff were crystallised into fixed charges in favour of the second plaintiff under the terms of the debentures.

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[16] On 3 April 2013, as a result of default in payments under the credit facilities by the first plaintiff, the second plaintiff had, in the exercise of its rights and powers under the debentures, appointed Mr Duar Tuan Kiat as the receiver and manager ("R & M") over the first plaintiff.

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[17] On 14 April 2013, the first plaintiff was wound up and Mr Lim Tian Huat was appointed as the liquidator of the first plaintiff.

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[18] As part of the functions and responsibilities of the R & M of the first plaintiff, the R&M had taken steps to realise the assets of the first plaintiff charged to the second plaintiff, including the vessels owned by the first plaintiff.

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[19] On 5 August 2014, the R&M filed an application in Kuala Lumpur High Court Civil Suit No. S-22NCVC-62-2011 to set aside the consent judgment dated 9 February 2011 but the same was dismissed on the basis that the court had opined that a fresh action ought to be filed in order to set aside the consent judgment dated 9 February 2011.

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[20] Hence, the plaintiffs filed this writ in order to set aside the consent judgment dated 9 February 2011.

The Findings Of The Court

[21] The core issue in this case is the setting aside of the consent judgment dated 9 February 2011 and/or alternatively that the consent judgment dated 9 February 2011 be varied. A consent judgment, being a contractual agreement having the force of law was considered by the Federal Court decision in *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301 where the court held as follows:

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a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see para. 390 @ p. 286, *Halbury's Laws of England*, 4th edn vol. 37). We gather from this proposition that (i) the agreement on the terms reached between the parties at the interlocutory stage of an action is a contract between the parties and (ii) the consent judgment or order arising out of that contract is also a contract between the parties except that the latter is superadded with the command of the court. In short, there are two contracts, one, before the court makes the order and two, after the order is made. After the order is made the first contract merges into the second

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A contract. That being the case, short of the order being made, the first contract will have to be separately considered on its binding effect based on incidents of a contract.

[22] On the issue of setting aside a consent judgment, the Federal Court in *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 1 LNS 143; [1971] 2 MLJ 75 held that:

B After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical slip or omission, or (b) **the judgment as drawn up does not correctly state what the court actually decided and intended to decide**, in either of which cases the application may be made by motion in the action. The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order.

(emphasis added)

[23] The same position was taken by another decision of the Federal Court in *Badiaddin Mohamad Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLRA 183, where Peh Swee Chin FCJ said as follows:

F the grounds referred to for setting aside a consent order of a judgement by consent are grounds which basically relate to *consensus ad idem* or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgment by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. *If the agreement upon which a consent order or judgement by consent is based, is vitiated by any ground recognised in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration, (see Huddesfield Banking Co v. Henry Lister [1895] 2 Ch 273 and the cases cited therein), then such a perfected consent order or judgment by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity.* (emphasis added)

H [24] Therefore, premised on the case of *Badiaddin (supra)*, the grounds to set aside a consent judgment will include “fraud, mistake, total failure of consideration, misrepresentation, coercion, undue influence and other grounds in equity.”

I [25] In the plaintiffs’ ‘submission in reply’, the plaintiffs took the position that the consent judgment dated 9 February 2011 is irregular because:

- (i) the first plaintiff and its directors knew that they had no authority to enter in the same and/or were prohibited from doing so;

- (ii) the first plaintiff and/or its purported agreement in entering into the consent judgment dated 9 February 2011 is worthless and is vitiated by fraud, misrepresentation, total failure of consideration and/or is illegal as an agreement in breach of s. 24 of the Contracts Act 1950; A
- (iii) the second plaintiff as the chargee of the vessels, whose rights and interests over the vessels are adversely affected by the consent judgment dated 9 February 2011 was not heard to protect its rights and interests before the consent judgment dated 9 February 2011 was entered; and B
- (iv) that the defendant was fixed with notice, actual/constructive, of the debentures and the prohibition on the first plaintiff in dealing with the vessels. C

[26] The first issue here is whether the consent judgment dated 9 February 2011 is vitiated by fraud or misrepresentation as asserted by the plaintiffs. However, there are no particulars of fraud or misrepresentation in the plaintiffs' amended statement of claim. D

[27] The issue was fraud was considered by Justice Varghese George in *Goh Hock Hai v. EON Bank Bhd* [2012] 4 CLJ 956, where the court held as follows:

I could not agree with counsel for the plaintiff that just because he was now crying 'fraud' or 'forgery', the plaintiff was entitled to a full trial to impeach the judgment duly entered in the 2001 suit in favour of the defendant ... E

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"However, to carry that 'right'" i.e., the right to set aside a judgment obtained by fraud "to its conclusion there had to (sic) some *prima facie* evidence to form the foundation of the allegation of 'deliberate fraud' or 'deception' practiced (sic) on the court or of the withholding of some material from which an inference of 'concealment or 'suppression' be ground drawn from ... F

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There was no basis for an impeachment of the judgment of 26 August 2010 in the 2001 suit either, as there was *no prima facie material produced to show that the sought to be impugned judgment was obtained as a result of a deliberate fraud perpetrated on the court in the 2001 suit or by reason of a deception on the court or by suppression of any material evidence by the defendant.* G

(emphasis added)

[28] In the present case, I am of the considered opinion that there is no evidence to show that the consent judgment dated 9 February 2011 was obtained as a result of a deliberate fraud perpetrated on the court or by reason of a deception on the court or by suppression of any material evidence by the defendant. Indeed, PW2 has also testified that there was no fraud or collusion on the part of the defendant: I

A KSV: You can't be sure but you have no evidence to show that there
 was any fraud or collusion, do you, Ms. Leong?

 LEONG: No, sorry, no to fraud but collusion I am not sure

B [29] It must also be emphasised that the first plaintiff was represented by
 a firm of solicitors, Messrs Edlin Ghazaly & Associate in the said suit which
 culminates in the consent judgment dated 9 February 2011. DW1 has given
 evidence on the process of entering the consent judgment and the plaintiffs
 did not call the first plaintiff's solicitor nor a representative of the first
 plaintiff. Therefore, I agree with the defendant that the parties have agreed
C to the terms of the consent judgment dated 9 February 2011 and realised the
 implications of the same.

D [30] On the issue of total failure of consideration, it is not in dispute that
 payment was not made to the second plaintiff. However, it is the defendant's
 case that they have made payment to Dato' Zul's account as instructed by
 the first plaintiff's directors and this is supported by the directors' resolution.
 This is further confirmed by the trust deeds which the first plaintiff had
 executed with the defendant.

E [31] Having considered the evidence, I accept the evidence of DW2 with
 regards to the issue of payment. The plaintiffs did not call any witness,
 namely the directors of the first plaintiff, to rebut the defendant's assertions.
 It is not as if the directors were not available as PW2 had given evidence that
 they have met the directors of the first plaintiff on numerous occasions.
 Surely they should have ascertained whether the payments have been made
 to the directors. The attitude of the plaintiffs can be seen from the evidence
 of PW2:

F KSV: Ok. Now, Question 19, the question that was put to you by your
 counsel was did the Directors and/or officers of NGV inform
 you of any dealings, between NGV and NSPL? ... My question
 to you Ms Leong is did you ask them? ... you can say that I was
 not told about any dealings with NSPL, did you ask them
G whether NGV had entered into any dealings with Network
 South Pacific Limited?

 LEONG: No.

H KSV: So ... let me put it this way, after you had knowledge of the
 consent judgment and documents were forwarded to the R&M,
 did you ask the Directors and officers of NGV?

 LEONG: No.

I [32] Premised on the reasons enumerated above, I am of the considered
 opinion that the plaintiffs have failed to establish "fraud, mistake, total
 failure of consideration, misrepresentation, coercion, undue influence and
 other grounds in equity" in order to set aside the consent judgment dated
 9 February 2011.

[33] However, the plaintiffs also take the position that the consent judgment should be set aside premised on the issue of illegality. In the case of *Badiaddin (supra)* Justice Azmi FCJ held as follows:

It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that **one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule** (which was not in issue and therefore not discussed in *Hock Hua Bank*) **is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction** so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

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For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a **category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.** It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (emphasis added)

[34] In *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLRA 175, the Federal Court held as follows:

[31] It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction (see *Badiaddin's* case)

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- A [35] We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that *Badiaddin* to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition ...
- B [36] As regards the appellant's submission on the court being *functus officio* and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in *Hock Hua Bank Bhd v. Sahari bin Murid* [1982] CLJ 125; [1981] 1 MLJ 143 which we think has settled these issues. The head notes from the report in that case, which need no further explanation, or expansion, is now reproduced as our answer to those related questions:
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- D In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed. Held:
- E (1) the learned judge was *functus officio*;
- F (2) the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;
- G (3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;
- (4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud.
- H [37] Although both the courts below had referred to the cases of *Ling Kuok Teck & Anor v. Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] 3 CLJ 889; MLJU 329 and the *Hock Hua Bank Bhd*, which cases involved **applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents**, both the courts unfortunately missed to observe that in both cases fresh actions were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a 'fresh action will lie to impeach the original judgment', and that the court had 'no power under any application in the same action to alter, vary or set aside a judgment regularly obtained. (emphasis added.)
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[35] It is the submission of the plaintiffs that the vessels were properly charged to the second plaintiff, and that under the debentures, whether fixed or floating charges, the first plaintiff cannot dispose of the charged property without the consent from the second plaintiff. Since the first plaintiff has entered into the sale agreements with the defendant after the crystallisation of the floating charges, then without the consent of the second plaintiff, the sale agreements with the defendant are invalid as the directors of the first plaintiff were not authorised to deal with vessels, and that any attempt by the directors to do so amounts to fraud or mistake. As such, the plaintiffs submit that there is a serious issue of illegality in this case.

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[36] In Suit S-22NCVC-62-2011, where the consent judgment dated 9 February 2011 was entered, the defendant's claim against the first plaintiff was for the sum of RM50,000,000, premised on the agreement whereby the defendant has paid for the vessels, which are yet to be built. After the defendant paid for the vessels, the first plaintiff is to hold the vessels on trust for the defendant until the completion of the construction. The first plaintiff was also granted the option to purchase the vessels for RM50,000,000. Subsequent agreements were executed by the first plaintiff and the defendant whereby first plaintiff agreed to buy back the vessels for the full price of the option amounting to RM50,000,000. When the first plaintiff failed to pay the RM50,000,000, the defendant sued the first plaintiff for the sum of RM50,000,000. The parties then enter into the consent judgment on 9 February 2011.

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[37] In the present case, the plaintiffs have tried to establish that the agreements between the first plaintiff and the defendant are null and void due to the lack of consent by the second plaintiff under the debentures. However, I am of the considered opinion that these are based on the construction of the documents and not "a defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction."

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[38] Added to that, there is no evidence that the defendant was privy to the alleged fraud committed by the directors of the first plaintiff, namely to sell the vessels without the consent of the second plaintiff. In any event, if the directors of the first plaintiff have committed fraud on the first plaintiff, then the plaintiffs can pursue a claim against the said directors.

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[39] The plaintiffs have also submitted that there is illegality because the second plaintiff was not given an opportunity before the consent judgment dated 9 February 2011 was entered and to its prejudice. With regards to this, the issue before the court in Suit S-22NCVC-62-2011 was the agreement between the first plaintiff and the defendant. Added to that, at the time the consent judgment was entered, the second plaintiff has not invoked its rights under the debentures.

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A [40] The last issue is on the restraining order in the consent judgment dated 9 February 2011, that is, ‘the first plaintiff and/or their agents and nominees are restrained in any way from dealing with the five vessels bearing Hull Nos. 1116, 1115, 1175 and 1187 respectively in any way until the settlement sum has been paid in full by the first plaintiff to the defendant. ’

B [41] The plaintiffs take the position that the above restraining order would effectively amount to a perpetual injunction against the R&M. This is because by reason of the first plaintiff being wound up, the first plaintiff would no longer be able to settle the judgment sum under the consent order dated 9 February 2011. Pursuant to s. 51(2) of the Specific Relief Act 1950,
C a perpetual injunction can only be granted after hearing the merits of the case, and not as in this case, under a consent judgment.

[42] However, I am of the considered opinion and I agree with the defendant that the above restraining order is merely to restrain the first plaintiff from dealing with the vessels until the judgment sum is fully settled.
D It is not a perpetual injunction and was granted before the first plaintiff was wound up.

[43] In view of my findings with regards to the setting aside of the consent judgment dated 9 February 2011, I will not deal with the other prayers and issues raised between the parties.
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Conclusion

[44] Based on the reasons enumerated above, I am of the considered opinion that this case does not fall within the ambit of *Badiaddin (supra)* and *Serac Asia Sdn Bhd (supra)* to enable this court to invoke its inherent jurisdiction and set aside the consent judgment dated 9 February 2011. The plaintiffs’ case is therefore dismissed with costs.
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